RECORD AND BRIEFS

16-6795

NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED (CAPITAL CASE)

While Carlos Ayestas' federal habeas proceeding was pending, the Harris County District Attorney's Office ("HCDA") accidentally disclosed a document memorializing the basis of its charging decision. The author of that HCDA charging memo had provided as one of two typewritten reasons for seeking the death penalty: "THE DEFENDANT IS NOT A CITIZEN." The lower federal courts have denied the routine stay-and-amendment procedure necessary to exhaust the claims associated with the HCDA memo in state court.

The lower courts have also denied Mr. Ayestas' motion, under 18 U.S.C. § 3599, for "investigative, expert, [and] other services" that were "reasonably necessary" to develop facts associated with a separate Sixth Amendment ineffective-assistance-of-counsel ("IAC") claim that had been forfeited by his state habeas lawyer. The Fifth Circuit interprets "reasonably necessary" to require an inmate to show "substantial need," an interpretation of § 3599(f) that forms an express circuit split with other federal courts of appeal. Through the substantial-need standard, the Fifth Circuit withholds expert and investigative assistance unless inmates are able to carry the burden of proof on the underlying claim at the time they make the § 3599(f) motion itself.

This case therefore presents the following questions:

1. **Whether reasonable jurists could disagree that, by anticipatorily applying a procedural default not actually grounded in state law, a district court abused its discretion when it refused a routine stay and amendment necessary to exhaust claims associated with newly discovered evidence revealing overt discrimination in the prosecution's decision to seek the death penalty.**

2. **Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an IAC claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made.**

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Carlos Manuel Ayestas, was the Petitioner before the United States District Court for the Southern District of Texas, as well as the Applicant and the Appellant before the United States United States Court of Appeals for the Fifth Circuit. Mr. Ayestas is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director and her predecessors were the Respondents before the United States District Court for the Southern of Texas, as well as the Respondent and the Appellee before the United States Court of Appeals for the Fifth Circuit.

Mr. Ayestas asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Carlos Manuel Ayestas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On March 22, 2016, the U.S. Court of Appeals for the Fifth Circuit issued an Opinion refusing to certify appeals from district court orders denying Sixth Amendment ineffective-assistance-of-counsel ("IAC") relief and a stay necessary to exhaust claims discovered during the pendency of federal proceedings. It also affirmed a district court order denying 3599(f) fact-development resources. The March 22, 2016 Opinion is reported as *Ayestas v. Stephens*, 817 F.3d 888 (5th Cir. 2016), and is attached as Appendix A. On June 10, 2016, the Fifth Circuit issued an Opinion Order in which it revised and supplemented the reasoning in its initial Opinion. The June 10, 2016 Opinion Order is reported as *Ayestas v. Stephens*, 826 F.3d 214 (5th Cir. 2016) (mem.), and is attached as Appendix B.[1]

On November 18, 2014, the district court issued a Memorandum Opinion and Order denying on remand Mr. Ayestas' petition for writ of habeas corpus, and denying Mr. Ayestas' Motion for Funding for Ancillary Services. The November 18, 2014 opinion is unpublished and unofficially reported as *Ayestas v. Stephens*, 2014 WL

[1] Mr. Ayestas' petition for certiorari was originally due on September 8, 2016. On August 10, Mr. Ayestas was granted an extension of forty-six days, making the new deadline October 24. Application (16A130) granted by Justice Thomas Extending Time to File Until Oct. 24, *Ayestas v. Davis*, No. 15-70015 (Aug. 10, 2016). On October 19, Mr. Ayestas was granted an additional fourteen-day extension, pushing the

6606498 (S.D. Tex. Nov. 18, 2014) (No. 51), and is attached as Appendix C. On February 17, 2015, the district court issued an Order denying Mr. Ayestas' Motion for Leave to Amend his Petition for Writ of Habeas Corpus, and his Motion to Stay and Abey Proceedings to permit exhaustion. The February 17, 2015 Order is attached as Appendix D. On April 1, 2015, the district court issued a Memorandum Opinion and Order denying Mr. Ayestas' Rule 59(e) Motion to Alter or Amend Judgment. The April 1, 2015 Opinion and Order is attached as Appendix E.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 & 2254. Under 28 U.S.C. § 1291, the Fifth Circuit had jurisdiction over issues arising under the Criminal Justice Act ("CJA"), codified at 18 U.S.C. § 3599. Under 28 U.S.C. § 2253, the Fifth Circuit had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability ("COA"). This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1), over all issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 & 2253, and under 18 U.S.C. § 3599.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

U.S. Constitution, Amendment VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Constitution, Amendment XIV provides: "No state shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

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deadline to November 7. Application (16A130) granted by Justice Thomas Extending Time to File Until Nov. 7, *Ayestas v. Davis*, No. 15-70015 (Aug. 10, 2016).

* * * *

18 U.S.C. § 3599 provides in pertinent part:

(a)(2) In any post conviction proceeding * * * seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain * * * investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f). * * *

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor * * *.

* * * *

28 U.S.C. § 2253(c) provides: "[a] certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right."

* * * * *

STATEMENT OF THE CASE

A. Trial and Direct Review

Carlos Manuel Ayestas was arrested on September 21, 1995 for killing Santiaga Paneque in the course of a robbery.[2] On September 19, before the arrest, now-embattled Harris County Assistant District Attorney ("HCDA") Kelly Siegler wrote an internal office memorandum entitled "Capital Murder Summary."[3] The "Siegler

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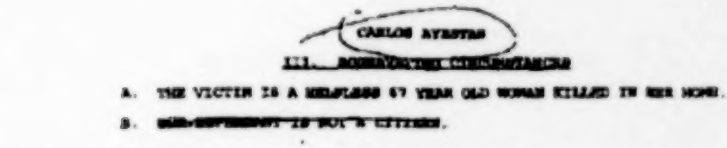
[2] Mr. Ayestas is also known as Denys Humberto Zelaya Corea, and has been identified as such in many of his previous filings.

[3] A Texas court recently recognized prosecutorial misconduct and granted a new trial in a case where Ms. Siegler was lead counsel. That court cited 36 instances of prosecutorial misconduct by the HCDA, and Ms. Siegler's secreting of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See* "Findings of Fact and Conclusions of Law," *Ex Parte David Mark Temple*, 178th District Court, No. 1008673-A (July 8, 2015). In the aftermath of *Temple*, scrutiny of Ms. Siegler

Memo" is attached as Appendix F. Ms. Siegler was the HCDA "Court Chief," which meant that she prepared memoranda on murders that could be charged capitally, and that served as sentencing recommendations to her superiors.

The Siegler Memo detailed the aggravating factors that might support an HCDA office decision to seek the death penalty. One of the two aggravating factors cited in favor of capitally charging Mr. Ayestas was his status as a foreign national:



App.F3.[4] HCDA supervisors adopted the recommendation and sought the death penalty.[5] Before the memo was discovered, someone drew a line through the reference to Mr. Ayestas' citizenship status. Nothing else is yet known about the mark.

On January 16, 1996, after Mr. Ayestas was arrested, the trial court appointed Diana Olvera as defense counsel. On February 15, 1996, she filed several pretrial motions, among them a request for the appointment of an investigator,

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has been renewed for withholding *Brady* evidence in a second Harris County capital case. *See* Brian Rogers, "Attorneys Attack Former Prosecutor in Another High-Profile Murder Trial," HOUSTON CHRON., July 19, 2015, *available at* http://www.houstonchronicle.com/news/houston-texas/houston/article/Attorneys-attack-Siegler-in-another-high-profile-6393907.php.

[4] The trial Reporter's Record is referred as "[volume number] RR [page]." The Clerk's Record is referred to as "CR [page]." The federal record on appeal is referred to as "USCA5.[page]."

[5] The recommendation was adopted by the Division Chief, Casey O'Brien, the Bureau Chief Kenn Henderson, and the elected District Attorney, John B. Holmes, Jr. USCA5.1142. Holmes wrote in the reasons for approving the capital prosecution at the bottom of the printed memo. USCA5.1142.

John Castillo. Trial counsel took no further action for the next 15 months. On June 3, 1997, 10 days before jury selection began, the appointment motion was granted.

Other than several meetings with Mr. Ayestas, Castillo's activity report reveals that he conducted little mitigation investigation. USCA5.878-80. Castillo took virtually no action until May 7, 1997, when he was told that the "case was set for trial" so he should "resume" investigation. USCA5.686. Castillo then reviewed records, prepared a client questionnaire, met with trial counsel, and drafted a letter to Mr. Ayestas' family. USCA5.878. Once appointed, he attended court hearings and met with Mr. Ayestas. USCA5.878-79. Castillo reported that he unsuccessfully attempted to contact Mr. Ayestas' family and some State witnesses. USCA5.879. Castillo spoke to Frank and Vilma Torres, two guilt phase witnesses. Castillo's record collection consisted of requests for Mr. Ayestas' California prison and immigration records, and criminal history searches on some State witnesses.

Castillo prepared an investigation report, compiled mainly from Mr. Ayestas' answers to the questionnaire, which revealed information relevant to Mr. Ayestas' mental health and history of substance abuse. Mr. Ayestas recounted multiple head traumas, including: a blow while playing soccer as an adolescent; a motorcycle accident in which he was not wearing a helmet, which continued to cause headaches; and damage from a car accident in Houston. USCA5.687-88. Mr. Ayestas reported that he started drinking alcohol when he was 16 years old, and that he did cocaine at least once a week. His cocaine use thereafter escalated, as he slipped into addiction. Finally, Mr. Ayestas provided names and addresses of people who knew him in

Houston. USCA5. 687-88. Trial counsel failed to follow up on any of these leads. An inventory of trial counsel's file prepared during state habeas proceedings reveals no notes or memoranda of interviews, prospective witness lists, memoranda of investigative objectives, or other items indicative of an investigation. USCA5.874-76.

During the punishment phase, the State presented Mr. Ayestas as a habitual criminal whose offense devastated others' lives. The State presented victim impact testimony from the victim's son, 21 RR 183-86, and evidence of extraneous offenses. 21 RR 93-95, 101-104, 136-39; 23 RR State's Ex. 123A, 125, 126 129. Mr. Ayestas' entire punishment phase defense consisted of three positive assessment letters from his prison English teacher. 21 RR 190-91. The State told the jury that "[m]aking steps to learn a second language does not lessen the moral blameworthiness for the enormity of his crime and his life of crime." 21 RR 232. Trial counsel also attempted to introduce two documents demonstrating Mr. Ayestas' clean Honduran criminal record and his Honduran work permit, but could not do so because their subject was identified as Denys Humberto Zelaya Cores. 21 RR 193-94. Trial counsel had not prepared any evidence showing this was Mr. Ayestas' real name. 21 RR 194-96; *see supra* note 2. During closing arguments, the State highlighted the absence of mitigation. 21 RR 232 ("Does he have anything in there that would lead you to conclude there is some type of mitigation, anything at all? *There is no drug problem. There's no health problem. There is no alcohol problem.*") (emphasis added).

Mr. Ayestas was convicted on July 9, 1997, and was sentenced to death the next day. 21 RR 238-42. A Texas jury must answer two "special issues" before im-

posing a capital sentence. First, the jury determined that Mr. Ayestas would be a future danger. Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). Second, presented with little evidence, it determined that there were no mitigating circumstances sufficient to spare Mr. Ayestas' life. TEX. CODE CRIM. PROC. art. 37.071, § 2(e). If a single juror had dissented on either question, no death sentence could have been imposed. Tex. Code Crim. Proc. art. 37.071, § 2(g). The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and sentence on November 4, 1998. *Ayestas v. State*, No. AP-72,928 (Tex. Crim. App. 1998). Mr. Ayestas did not seek certiorari review.

B. State Habeas Proceedings

Texas law required Mr. Ayestas to file his first state habeas application while his conviction was pending on direct review. *See* Tex. Code Crim. Proc. art. 11.071 § 4(a). The TCCA appointed Gary Hart to represent Mr. Ayestas on January 19, 1998. Hart and a co-worker, Robin Norris, had recently left jobs as TCCA staff attorneys, forming a partnership and taking five capital habeas cases each. USCA5. 707-12. On February 10, 1998, Hart retained mitigation specialist Tena Francis to work this case. Francis had worked with Hart and Norris on a number of other cases; she knew that they responded to being overextended and underpaid "by limiting investigation and by raising mostly record-based claims." USCA5.702. Her experience was that they were "not interested in investigating mitigation evidence or in fully developing evidence related to the punishment phase." USCA5.702. In this case, she believed Hart was not "as concerned about conducting a comprehensive mitigation investigation," and he did not "seek adequate funding for them." USCA5.702.

Francis prepared an investigation plan, designed to help Hart secure court funding. USCA5.699, 703, 715-21. Francis notified Hart that the jury had heard virtually no mitigation evidence concerning Mr. Ayestas' background, advising him:

> The jury heard nothing about this defendant's family, realcharacter, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological traumas * * *. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history of the client.

USCA5.720. She told Hart that an investigation required document collection and witness interviews of friends outside the Ayestas family, and that it would cover Honduras, Mexico, California, and Houston. USCA5.703. She emphasized that Hart should investigate comprehensively Ayestas' history of addiction and mental health. USCA5.703-04. She believed substance abuse could have affected Mr. Ayestas' brain and impacted his ability to regulate his behavior, USCA5.704, and knew that it could either activate mental illness or represent a means of self-medication.

Hart clearly understood that addiction was relevant evidence ignored at sentencing, as his hand-written notes state: "Ayestas' drinking and/or drug consumption as a possible mitigating fact. How could this have been developed at trial?" USCA5.768. Francis further advised counsel that a mitigation investigation would account for "mental health [and] possible mental illness," USCA5.720. Hart, however, did not follow his investigators' advice. In particular, he did not investigate Mr. Ayestas' mental health issues or his history of addiction. In accordance with counsel's instructions, there was no investigation into the mitigation topics that Francis identified in her investigation plan. USCA5.699-700.

Hart himself undertook the mitigation investigation. He ignored the expert plan, and interviewed only three witnesses: Mr. Ayestas' mother, Zoila, and his two sisters, Blanca and Xiomara. USCA5.723, 750, 752-53. Hart learned that Mr. Ayestas was born and grew up in Honduras, that he came from a stable middle class background, and that his home life was loving and supportive. USCA5.804-27. However, when Mr. Ayestas was 18 years old, he left for the United States without telling his immediate family, who learned little more about his travels. The first red flag was when the family learned that eventual co-defendant Frederico Zaldivar was trailing and corrupting Mr. Ayestas. After those interviews, state habeas counsel discontinued investigation. He sought to interview no additional witnesses in Honduras, and did not investigate in California or Mexico—despite knowing that Mr. Ayestas spent significant time there. He did little to investigate the circumstances of Mr. Ayestas' life in Houston, leading up to the crime; all of his investigation focused on the circumstances surrounding Mr. Ayestas' arrest in Louisiana.

On December 9, 1998, Hart and Norris filed Mr. Ayestas' application for state habeas relief. The application included a Sixth Amendment ineffective-assistance-of-counsel ("IAC") claim that trial counsel failed to secure testimony of Honduran witnesses as to "good character traits, positive upbringing, good scholastic record, and lack of juvenile or criminal record while growing up in Honduras." USCA5.5270, 5294-5301. The application mentioned neither mental illness nor substance abuse, and omitted an IAC claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), for unreasonably narrowing the sentencing investigation ("*Wiggins* claim").

In responding to the IAC claim, the State included an affidavit from trial counsel. USCA5.5515-19. Trial counsel asserted that Mr. Ayestas instructed the defense team not to contact his family because of problems in Honduras. USCA5.5516-17. According to trial counsel, Mr. Ayestas did not relent until after jury selection had concluded. USCA5.5517. Trial counsel reported that the family could not come to the United States to testify and that Mr. Ayestas' mother appeared unconcerned about her son's situation. USCA5.5517.

As state habeas proceedings progressed, Mr. Ayestas' mental health severely deteriorated. In 2001, Mr. Ayestas had a serious psychotic episode. USCA5.770-74. Mr. Ayestas' TDCJ psychiatrist thereafter diagnosed him with schizophrenia, undifferentiated type. USCA5.772. The psychologist that assessed Mr. Ayestas at Hart's request informed Hart of "concerns regarding Mr. Ayestas' psychological pattern" and stated, "clearly his mental status needs to be evaluated closely." USCA5.776. Even as state habeas proceedings remained pending, Hart failed to supplement the state application with any mental health evidence. In 2006, citing plans to return to the TCCA as a staff attorney, Hart sought to withdraw and substitute Norris as Mr. Ayestas' counsel. USCA5.5689-91. Mr. Ayestas refused to consent to Norris' representation, USCA5.5695, and so the TCCA appointed Kurt Wentz. USCA5.5696.

Ultimately, the state habeas court concluded: "Trial counsel cannot be considered ineffective based on [Mr. Ayestas'] family not attending the * * * trial, in light of [Mr. Ayestas'] numerous, initial assertions that he did not want his family contacted and in light of trial counsel's extensive efforts to attempt to secure the

presence of [Mr. Ayestas'] family from Honduras after [Mr. Ayestas] changed his mind." USCA5.5933. The TCCA adopted the findings and denied relief. *Ex parte Ayestas*, No. WR-75-4409-A (Tex. Crim. App. 2008) (not designated for publication).

C. Federal Habeas Proceedings

1. Pre-Remand Proceedings

With new counsel, Mr. Ayestas filed a federal habeas petition. USCA5.8-68. Based on a preliminary investigation, he included a *Wiggins* claim: that trial counsel unreasonably narrowed the sentencing investigation after encountering obvious red flags for mitigation. Among other things, he averred that, had trial counsel pursued clear indicators of mental health problems and substance abuse, there was a reasonable probability that the sentencing jury would have spared his life.

Mr. Ayestas argued that a sufficient mitigation investigation would have revealed readily "available and abundant" mitigation, including evidence about his upbringing and addiction, and that he suffered from early-stage schizophrenia and other mental illness. USCA5.14-15, 28-30. In new affidavit, family members Blanca Ayestas, Xiomara Ayestas, and Zoila Corea explained their interactions with trial and state habeas counsel, and elaborated on evidence that prior counsel never asked them to provide. TDCJ medical records obtained by federal habeas counsel revealed Mr. Ayestas' chronic mental conditions, including schizophrenia and psychosis—conditions that resulted in visual and auditory hallucinations, and that required multiple psychotropic medications. USCA5.28-30; 770-74. The records further detailed Mr. Ayestas fourteen-year history of alcohol abuse. USCA5.30.

In declarations attached to the federal petition, Mr. Ayestas' sister Blanca Keller (nèe Ayestas) related that state habeas counsel interviewed her and Mr. Ayestas' mother Zoila Corea together, and sought only information concerning Mr. Ayestas' good character. USCA5.855-63. Blanca explained that, had she been asked, she could have told state habeas counsel about Mr. Ayestas' "struggles" in Honduras, including the fact that he had three children by the time he was 17 years old. USCA5.862. She also disclosed that he was kidnapped in Mexico during a trip to the United States, and held captive until Mr. Ayestas' father paid a ransom six months later. USCA5.862. She identified numerous witnesses who could have given helpful favorable information about Mr. Ayestas, had she ever been asked. USCA5.863.

During the federal habeas investigation, Mr. Ayestas' sister Xiomara Ayestas and his mother Zoila Corea similarly provided information about their family's dysfunction. USCA5.846-53 (Xiomara Ayestas Aff.); 865-72 (Zoila Corea Aff.). Ms. Corea was 15 and Mr. Ayestas' father was 35 when the two met. USCA5.869. Mr. Ayestas' father never married his mother, and he had 22 children with a number of different women. USCA5.869. He visited his other families for two or three days at a time, and maintained a separate home. USCA5.852, 869. Xiomara characterized her father as extremely strict, requiring "absolute respect," and recited an episode in which he shot their neighbor to end a feud over a dog. USCA5.852. After the shooting, Mr. Ayestas' father never returned to Ms. Corea's house. USCA5.852.

The federal habeas investigation revealed that, though Mr. Ayestas had been a polite, studious child, when he was 16 years old, he began to change. USCA5.870.

He started staying out late and drinking alcohol. USCA5.870. He fathered a child with a woman who was older than he was. USCA5.870. He also stopped going to school. USCA5.870. When he was 18 years old, he told his mother that he was going to Guatemala, but he really went to the United States. USCA5.871. Xiomara also confirmed that Mr. Ayestas had been abducted in Mexico and held for ransom. USCA5.852. Finally, she stated that there were numerous people in Honduras, other than Mr. Ayestas' family, who could have provided information about Mr. Ayestas' upbringing. USCA5.852-53.

In her answer, the Director contended that the *Wiggins* claim was procedurally defaulted. USCA5.101-04. The district court agreed and denied relief. USCA5.502-07. On February 22, 2012, it refused a COA, holding that the "errors by habeas counsel cannot provide cause for a procedural default." USCA5.617. Shortly after the district court ruling, this Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), holding that state inmates may revive otherwise defaulted IAC claims if they were defaulted because state habeas counsel was deficient. *See* 132 S. Ct. at 1320. The following term, this Court decided *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), holding that *Martinez* applied in favor of Texas inmates. *See* 133 S. Ct. at 1921. On June 3, 2013, this Court granted Mr. Ayestas' petition for writ of certiorari, vacated the Fifth Circuit judgment, and remanded the case to the Fifth Circuit. *Ayestas v. Thaler*, 133 S. Ct. 2764 (2013) (mem.). On January 30, 2014, the Fifth Circuit remanded the case to the district court. USCA5.624-26.

2. Post-Remand Proceedings

With *Martinez* and *Trevino* establishing that Hart's performance might excuse default of the *Wiggins* claim, Mr. Ayestas sought fact development necessary to prove the excuse. He moved for investigation and expert assistance under 18 U.S.C. § 3599(f). USCA5.662-66. On November 3, 2014, he filed an *ex parte*, sealed motion under 18 U.S.C. § 3599(f) seeking authorization for a mitigation specialist to conduct the comprehensive mitigation investigation that trial and state habeas counsel failed to conduct. The § 3599(f) Motion is attached under seal as Appendix G.

On November 18, 2014, the district court denied § 3599(f) resources to factually develop the *Wiggins* claim, denied the claim on the merits, and declined to certify an appeal. App.C16. In denying and refusing to certify the claim itself, the district court held (1) that trial counsel could not have been deficient because Mr. Ayestas had at one point instructed her not to interview family members (App.C10), and (2) that his pleading did not attach records of mental health and substance abuse created at the time of trial. (App.C11). In withholding § 3599(f) resources, the district court invoked the Fifth Circuit rule that such resources were unavailable unless there was a "substantial need for investigative or expert assistance." App.C13 (internal quotation marks and citations omitted). The district court explained that there was no substantial need because he could not carry the ultimate burden of proof at that time: "Ayestas fails to *demonstrate* that trial counsel was deficient, that [he could satisfy the IAC prejudice prong], or that his state habeas counsel was ineffective." App.C14 (emphasis added).

On December 16, 2014, Mr. Ayestas filed a timely post-judgment motion under Federal Rule of Civil Procedure ("FRCP") 59(e). USCA5.969. On December 22, counsel for Mr. Ayestas reviewed portions of the HCDA file at the HCDA office. During that review, counsel discovered the Siegler Memo—work product inadvertently left in the HCDA file—which gave rise to claims under the Eighth and Fourteenth Amendments ("Siegler Memo claims"). As explained above, the Siegler Memo *expressly* gave Mr. Ayestas' status as a foreign national as one of two reasons for seeking the death penalty. App.F3. On January 9, 2015, while Mr. Ayestas' FRCP 59(e) motion was pending, he moved, under FRCP 15, to amend his petition and add the Siegler Memo claims. USCA5.1132.[6]

Mr. Ayestas also moved to stay and hold his federal proceeding in abeyance so that he could exhaust the Siegler Memo claims in state court. USCA5.1152. Under *Rhines v. Weber*, 544 U.S. 269 (2005), a stay-and-abeyance order ("*Rhines* stay") is the standard practice for pausing a federal proceeding, allowing an inmate to exhaust a newly discovered claim and then add it via FRCP 15 amendment. *See id.* at 278. On February 17, 2015, the district court denied both the FRCP 15 motion and the *Rhines* stay. App.D6. On April 1, the district court denied the FRCP 59 motion and a COA. App.E4.

In the Fifth Circuit, Mr. Ayestas requested a COA on the orders denying the *Rhines* stay and the amendment, and he appealed the order denying § 3599(f) serv-

[6] On January 14, 2015, Mr. Ayestas filed a "Supplement to Petitioner's Rule 59 Motion to Alter or Amend The Judgment Urging Court To Grant Leave to Amend Original Petition for Writ of Habeas Corpus." USCA5.1143.

ices.[7] On March 22, 2016, the appeals court denied all relief. It held that a *Rhines* stay was inappropriate because, were Mr. Ayestas to present the Siegler Memo claims to the TCCA, the TCCA would have treated them as procedurally defective under the Texas post-conviction statute. App. A14-A17. It also held there was no permissible amendment for a *Rhines* stay to facilitate because such relief was outside the scope of its post-*Trevino* remand order. App.A13-A14.

On the § 3599(f) issue, the Fifth Circuit invoked the Fifth Circuit rule that the investigative services to develop a claim are "reasonably necessary" within the statutory provision only if there is a "substantial need" for them. App.A7-A8. It then performed the substantial-need analysis by declaring the undeveloped *Wiggins* claim meritless, and therefore unworthy of investigation. The Fifth Circuit twice justified its determination of meritlessness by reference to trial counsel's effectiveness in having Mr. Ayestas examined by a psychologist. App.A10, A11. As to prejudice, it held: "[W]e find it at best to be conceivable, *but not substantially likely*, that the outcome may have been different." App.A11 (emphasis added).

Upon the submission of rehearing petitions, the Fifth Circuit revised its opinion. *See* App.B1-B2. With respect to the *Rhines* stay, the Fifth Circuit clarified that it denied relief because it determined that *trial counsel* was at fault for failing to obtain the Siegler Memo. App.B2. With respect to the § 3599(f) issue, it confessed that its prior deficiency holding had erroneously assumed that trial counsel submit-

[7] The Fifth Circuit seemed to believe that Mr. Ayestas applied for a COA on the underlying IAC claim that he was denied resources to develop, App.A12-13, but he sought no such relief.

ted Mr. Ayestas for psychiatric evaluation (trial counsel did not), but its ultimate determination remained unchanged. Specifically, it affirmed its prejudice determination: that the *Wiggins* claim was unworthy of fact development because a different sentencing result was not substantially likely. App.B2. This Petition follows.

REASONS FOR GRANTING RELIEF

The Fifth Circuit gratuitously imposed procedural hurdles to the development of meritorious claims. It prevented exhaustion of the Siegler Memo claims by anticipatorily applying a procedural-default bar, faulting trial counsel for not obtaining core prosecution work product. The Fifth Circuit also refused expert and investigative services for the *Wiggins* claim, applying a circular substantial-need framework under which courts withhold § 3599(*f*) resources when a movant cannot carry the ultimate burden of proof on the underlying claim at the time the motion is made. The substantial-need holding deepens an existing split with the Sixth Circuit. This Court should grant certiorari to stop the Fifth Circuit from short-circuiting the Siegler Memo and *Wiggins* litigation.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER REASONABLE JURISTS COULD DISAGREE ON THE APPROPRIATENESS OF THE *RHINES* STAY.

The Siegler Memo captures crucial HCDA personnel recommending that Mr. Ayestas be capitally charged because he was "not a citizen." Without further discovery, nothing else can be known about the memo, the broader significance of foreign-national status in HCDA charging practice, or whether HCDA personnel were targeting *Latino* defendants. The lower courts, however, denied the routine process for

dealing with such newly discovered evidence: a *Rhines* stay to exhaust the Siegler Memo claims and the FRCP 15 amendment necessary to add them to the pleadings.

A. The Fifth Circuit Determined That Trial Counsel Was At Fault For Failing To Obtain Core HCDA Work Product.

Before a federal court may entertain a state inmate's claim, it must be exhausted in state court. *See* 28 U.S.C. § 2254(b). Federal courts must dismiss "mixed petitions"—habeas complaints containing both exhausted and unexhausted claims—without prejudice. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982). Federal law provides a mechanism for staying the proceeding—a *Rhines* stay—while the state inmate presents the unexhausted claims to state courts. *See Rhines v. Weber*, 544 U.S. 269, 275-76 (2005). *Rhines* stays are particularly important in cases like this one, when a new (and unexhausted) claim is discovered while the federal petition remains pending. A *Rhines* stay is appropriate where there is "good cause" and the claims are not "plainly meritless." *Id.* at 277. The district court denied a *Rhines* stay, and the Fifth Circuit refused to certify an appeal on the grounds that the Siegler Memo claims were (in some procedural sense) "meritless." App.A14.[8]

The Fifth Circuit deemed the Siegler Memo claims "meritless" by anticipatorily applying a procedural default; the Fifth Circuit believed that Texas courts would refuse to entertain the claims. App.A15-17. In declaring default, the Fifth Circuit analyzed the applicable Texas capital habeas provision, which reads:

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[8] The Fifth Circuit opinion includes a passage stating that the Siegler Memo claims were not meritorious because "Ayestas's trial counsel and his state habeas attorneys were not ineffective." App.A17. This passage appears to be some sort of scrivener's error; the Siegler Memo claims are not IAC challenges.

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application * * * .

Tex. Code. Crim. Proc. art. 11.071 § 5(a)(1). Subsection 5(e) then defines factual availability under § 5(a)(1): "a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the reasonable diligence on or before that date."

The Fifth Circuit concluded that the TCCA would not entertain the Siegler Memo claims because "Ayestas's briefing in this court and in the district court never suggests he sought to examine the prosecution's file *prior* to the December 22 search that uncovered the memorandum." App. A15. In its supplemental opinion, the Fifth Circuit clarified that it was "not, though, referring to the diligence of federal habeas counsel in locating the memo. It was the diligence of Ayestas's trial counsel that we were describing." App.B2.

B. Reasonable Jurists Can Debate Whether Mr. Ayestas Was Entitled To A *Rhines* Stay.

28 U.S.C. § 2253(c)(2) provides that a COA should issue if an inmate "has made a substantial showing of the denial of a constitutional right." Under *Slack v. McDaniel*, 529 U.S. 473 (2000), an inmate may appeal an adverse "procedural" ruling if "jurists of reason would find it debatable whether the petition states a valid

claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478.

Mr. Ayestas meets the COA requirements. The Fifth Circuit nested its anticipatory default holding inside its *Rhines* disposition, although there was no need or justification for doing so. If the TCCA were to refuse to authorize litigation of the Siegler Memo claims, then the claims would be defaulted upon return to federal court, and an *actual* default could be imposed at that time. The Fifth Circuit's rationale for the *anticipatory* default holding—that trial counsel was at fault for failing to obtain the Siegler Memo—betrays a basic misunderstanding about the availability of core prosecution work product.

1. The underlying constitutional claims have merit.

To succeed in obtaining a *Rhines* stay, Mr. Ayestas must demonstrate that his claim is not "plainly meritless." *Rhines*, 544 U.S. at 269. The underlying conduct here is constitutionally egregious. The Siegler Memo was written by a former HCDA attorney who committed extensive prosecutorial misconduct in other cases, it expressly adverted to Mr. Ayestas' noncitizenship as a reason to capitalize the prosecution, and it was passed up the HCDA chain of command. State officials clearly discriminated in the charging decision, and the only question is how many.

Selective prosecution—by reference to race, nationality, alienage status, or ethnicity—erodes the basic credibility of American legal institutions. It "undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice." *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)

(referring to discrimination in the jury selection process). *Cf. Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

Though prosecutors enjoy broad charging discretion, "[s]electivity in the enforcement of criminal laws is * * * subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125 (1979). Factors such as "race or religion may play no part in [the state's] charging decision." *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978). Specifically, the Equal Protection clause bars a selective prosecution involving a suspect classification. *See Oyler v. Boles*, 368 U.S. 448, 456 (1962). In Equal Protection jurisprudence, "[c]lassifications based on race or national origin * * * are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (internal citations omitted). Discrimination on the basis of alienage is treated the same way as discrimination based on race or national origin. *See Trimble v. Gordon*, 430 U.S. 762, 780 (1977) ("In cases involving alienage, for example, [the Court] has concluded that such classifications are 'suspect' because, though not necessarily involving race or national origin, they are enough like the latter to warrant similar treatment."). Using impermissible criteria to selectively prosecute an offense, especially a capital crime, also implicates the Eighth Amendment. *See DeGarmo v. Texas*, 106 S. Ct. 337, 338-39 (1985) (mem.) (Breyer, J., dissenting from the denial of certiorari) ("[I]f the price of prosecutorial independence is the freedom to impose death in an arbitrary, freakish, or discriminatory manner, it is a price the Eighth Amendment will not tolerate.").

This case requires none of the caution associated with inferential discrimination claims based only on a pattern of outcomes. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) ("Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."). Nor does an entitlement to discovery depend on a statistical analysis of similarly situated defendants. *Compare United States v. Armstrong*, 517 U.S. 456, 469 (1996) (conditioning discovery on a showing that "the Government has failed to prosecute others who are similarly situated to the defendant"). Rather, the Siegler Memo is *direct* evidence of discrimination. Where an impermissible factor is explicitly cited as guiding the state's decision-making, it must be taken at face value. *See Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (rejecting attempts to neutralize clear references to race of potential jurors in file).

2. Trial counsel was not at fault for failing to obtain the Siegler Memo.

The Fifth Circuit denied the *Rhines* stay because it anticipated that Texas would not entertain the claim. App.A17. As explained above, the Texas statute *does* require courts to entertain claims based on newly available facts, and facts are newly available "if the factual basis was not ascertainable through the reasonable diligence on or before [the date of the initial application]." Tex. Code. Crim. Proc. art. 11.071 § 5(a) & 5(e). The Fifth Circuit held that the Siegler Memo claims were "factually available" when Mr. Ayestas filed his first state post-conviction application, reasoning that trial counsel was at fault for failing to obtain the memo. Neither legal authority nor common sense supports the notion that Mr. Ayestas was at

fault for failing to obtain sensitive prosecution work product in the middle of a capital trial. Even *after* trial concludes, the State has a long-standing policy of redacting work product from its files before allowing an inmate's legal team to review them. *See* Scott Durfee Aff., *Ex parte Lewis*, No. 1428102 (351st Tex. D. Ct. (Harris County) Sept. 28, 2016) (during capital habeas discovery, "[t]he privileged and confidential information in the State's file is held back and the remainder of the file is made available to the defense counsel for review").

The Siegler Memo was confidential intra-office communication that disclosed the prosecution's innermost thoughts about the case—and thereby meets the black-letter definition of privileged work product. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *see also* FRCP 26, Advisory Comm. Notes, 1970 Amendment (stating that the work product doctrine "protect[s] against disclosure of the mental impressions, conclusions, opinions or legal theories concerning the litigation of an attorney or other representative of a party"). Texas work-product rules parallel those used in federal courts, *see National Bank Co. v. Brotherton*, 851 S.W.2d 193, 202 (Tex. 1993), and cover documents in both civil and criminal proceedings, *see State ex rel. Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994). It offers particularly robust protection for office memoranda. *See National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993) ("An attorney's litigation file goes to the heart of [] privileged [work product]. The organization of the file * * * necessarily reveals the attorney's thought processes concerning the prosecution or

defense of the case."); *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987) (referring to "indexes, notes and memoranda" as "work product in every sense of the term").

The Supreme Court case that the Fifth Circuit cited was *Rompilla v. Beard*, 545 U.S. 374 (2005), which it characterized as holding that "counsel's failure to look at the 'readily available' prosecution file was deficient performance * * *." App.A15-A16. *Rompilla*, of course, was not about trial counsel's failure to obtain State work product in the *then-pending prosecution*, but counsel's failure to get a publicly available trial transcript from a *prior conviction*. *See Rompilla*, 545 U.S. at 384. The file in *Rompilla* "was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried." *Id.* The Siegler Memo, by contrast, was not a "public document" that was "readily available." It was sensitive work product that, in the very proceeding at issue, the State had refused to disclose after multiple requests. *See* USCA5.1411-18, 1437-38 (trial counsel's multiple motions for favorable or exculpatory material in the State's possession).

Even if Texas ultimately refused to entertain Siegler Memo claims, the Fifth Circuit's default ruling was *still* premature. First, only an "adequate and independent" procedural ground can trigger federal default. *See Beard v. Kindler*, 558 U.S. 53, 55 (2009). A procedural ground is not adequate if it is not "firmly established and regularly followed." *Id.* at 61 (citations and quotation marks omitted). If the TCCA had barred the Siegler Memo claims under art. 11.071 § 5(a)(1), then that ground would have been "inadequate" and posed no bar to merits review in federal court. Second, not all defaults preclude merits review. An inmate can excuse default

by demonstrating either "cause and prejudice" or a "miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Mr. Ayestas can argue that any erroneously-imposed default is excused—because, among other things, the express reference to his citizenship status as a reason for capitalizing the proceeding qualifies as a miscarriage of justice.

C. The "Mandate Rule" Does Not Foreclose Consideration Of The Siegler Memo Claims.

The Fifth Circuit also denied the *Rhines* stay on the ground that there was no amendment for it to facilitate, because adding the Siegler Memo claims would violate the "mandate rule" limiting a lower court's post-remand consideration to matters not excluded by the order of the higher court. App.A13. The Fifth Circuit's remand order in the prior appeal stated: "We REMAND to the district court to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*. We express no view on what decisions the district court should make on remand." App.A14. The Fifth Circuit then interpreted its prior remand order as instructing the district court to consider nothing other than defaulted IAC claims. App.A14. Citing the mandate rule in this appeal, the Fifth Circuit held that, by specifying questions to be decided on remand, its prior mandate implicitly limited that remand to those questions. App.A13 (quoting *Henderson v. Stadler*, 407 F.3d 351, 354 (5th Cir. 2005)).

The Fifth Circuit's proposition—that a remand order designating an issue limits the remand to consideration of that issue—is foreclosed by longstanding precedent. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895) ("The [lower]

court may consider and decide any matters left open by the mandate of [the higher] court."). The mandate rule bars remanded consideration only of issues or claims "previously determined" by the remanding court, and the receiving court "is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979); *see also Jackson v. Sullivan*, 987 F.2d 772 (5th Cir. 1993) ("If the mandate is silent as to an issue, this doctrine applies only if the appellate court decided the question by 'necessary implication.'") The Panel did not expressly resolve the Siegler Memo claims; nor did it resolve those claims "implicitly" or "necessarily." Far from "necessarily deciding" the Siegler Memo claims, the Panel necessarily *did not* decide them—because they were not included in the prior appeal.

* * *

When the State seeks the death penalty against a defendant because he is a noncitizen, it does not just violate the Constitution; it also undermines the legitimacy of American law enforcement. Instead of moving swiftly to redress the clear constitutional violation, the Fifth Circuit amplified the damage. Supreme Court intervention is necessary both to correct legal error in this case and to send a clear message about discriminatory charging practice in this country.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT OVER THE FIFTH CIRCUIT'S "SUBSTANTIAL NEED" TEST FOR FACT DEVELOPMENT.

In certain situations—as with the *Wiggins* prejudice prong requiring inmates to show the results of an adequate investigation—an inmate cannot plead a factu-

ally developed claim without a court award of resources necessary to develop it. 18 U.S.C. § 3599(f), the pertinent provision, provides:

> Upon a finding that investigative, expert, or other services are *reasonably necessary* for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g).

(Emphasis added.)[9] The Fifth Circuit interprets § 3599(f)'s reference to "reasonably necessary" services to require a showing of "substantial need," *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004). In applying its substantial-need rule to inmates like Mr. Ayestas—who have had no resources to develop *Wiggins* prejudice—the Fifth Circuit uses a § 3599(f) rule that starves meritorious IAC claims of resources. The Fifth Circuit's interpretation of § 3599(f) creates a split with the Fourth and Sixth Circuits, the latter of which expressly rejects the substantial-need rule.

A. The Fifth Circuit Used Its Substantial-Need Rule To Deny Experts And Investigators To Mr. Ayestas, An IAC Claimant Lacking Any Prior Opportunity To Develop Facts.

An IAC claimant must show that "[trial] counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins*, 539 U.S. at 521. A *Wiggins* claim alleges that trial counsel unreasonably narrowed a sentencing investigation by prejudicially failing to explore red flags appearing during the representation. *See id.* at 525. Mr. Ayestas pleaded a procedurally defaulted *Wiggins* claim in federal

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[9] Section 3599(f)'s precursor provision, analyzed in much of the precedent, also mandated that expert services be "reasonably necessary for the representation of the defendant." 21 U.S.C. § 848(q)(9); § 848(q)(4)(B) (applying the provision to capital defendants seeking habeas relief).

court at a time when its forfeiture could not be excused by deficient state habeas representation. In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013)—decided while *Ayestas* remained pending—this Court held that Texas inmates might assert a state habeas lawyer's ineffectiveness to excuse otherwise defaulted IAC claims. *See Trevino*, 133 S. Ct. at 1921; *Martinez*, 132 S. Ct. at 1316. This Court then granted, vacated, and remanded *Ayestas* for post-*Martinez/Trevino* consideration. *Ayestas v. Thaler*, 133 S. Ct. 2764 (2013) (mem.).

As do other post-*Martinez* claimants seeking to excuse forfeiture committed by state habeas counsel, Mr. Ayestas pleaded and briefed his *Wiggins* claim without having factually developed all aspects of it—most importantly, the prejudice prong. USCA5.691, 694. He then moved, under § 3599(f), for investigative resources necessary to develop his position. App.G1-G14. The § 3599(f) motion was not an unsupported request for a fishing expedition. Its appendix included a twenty-page investigation plan—created by an experienced mitigation specialist—setting forth details about the parameters, goals, and projected costs for the investigation. App.G17-G36. Its exhibits included three affidavits from family members attesting to various aspects of Mr. Ayestas' life, character, experiences, and behavior. App.G40-G63. Mr. Ayestas had also submitted a fifty-page brief on remand, USCA5.647-96, supplemented by a voluminous appendix containing, among other things, trial counsel's file and affidavits from family members. USCA5.845-81.

The § 3599(f) motion and complementary material recited trial counsel's failure to develop *or* present significant mitigating evidence. App.G8. It showed that,

despite her awareness of a history of substance abuse and red flags for mental health problems, trial counsel's preparation was delayed, rudimentary, and proceeded on a timeline inconsistent with her explanation that she throttled investigation on Mr. Ayestas' instruction. USCA5.687-88; App.G8. Mr. Ayestas explained that trial counsel's file disclosed a complete failure to investigate or pursue his mental health status. USCA5.685-86, 687-77. An inventory of her trial file, included as an exhibit to the brief on remand, reveals no attempt to retain or consult a mental health expert. USCA5.873-76.

Having been deficiently represented until the federal habeas phase, Mr. Ayestas could not specify precisely the omitted mitigation without being given resources to perform some of the investigation. His § 3599(f) motion and briefing on remand nevertheless gave a substantial picture of the omitted evidence. Additional family members and associates provided previously undisclosed information about the poverty and dysfunction that marked Mr. Ayestas' childhood, as well as changes in his behavior and demeanor over time. USCA5.680-84; App.G28-G29 (Nicole VanToorn Investigation Plan), G46 (Jose Magana Aff.), G54 (Nolvia Corea Aff.). The § 3599(f) motion made clear that these preliminary findings were only the tip of the iceberg. Mr. Ayestas provided the court specific details about the importance of an in-depth mental health evaluation, based on a psychologist's preliminary review of Mr. Ayestas' medical records. USCA5.769-78; App.G10.

The § 3599 motion also included the specialist's comprehensive investigation plan for piecing together Mr. Ayestas' turbulent life in Mexico, California, and Tex-

Texas—when signs of his mental illness likely emerged. App.G10-11; USCA5.684-85. The investigation plan contextualized much of the evidence that had already been collected, especially as it related to the onset of Mr. Ayestas' schizophrenia, and it also detailed resources the investigator needed to develop appropriately reliable findings. App.G27, G30-G36. The investigator similarly explained that further record collection and interviewing would uncover information relating to Mr. Ayestas' history of substance abuse. App.G33-G34.

As the § 3599 motion and the briefing on remand showed, state habeas counsel also performed deficiently, largely ignoring the *Wiggins* claim. USCA5.666-85; App.G1-G2, G7. The state habeas investigator had emphasized the importance of finally developing a social history, especially relating to Mr. Ayestas' substance abuse. USCA5.669. State habeas counsel's funding motion and notes demonstrate that he, too, understood the import of such evidence. USCA5.673, 768. He nevertheless disregarded the investigator's detailed plan and undertook the investigation himself, culminating in just three affidavits containing only good-character evidence. App.G7. State habeas counsel ignored new red flags about Mr. Ayestas' childhood and new leads for people with relevant information. He also knew about and failed to pursue the very same substance abuse and mental health evidence that trial counsel had ignored. USCA5.675-77; AppG7-G8. Because state habeas counsel failed to follow up on or litigate the schizophrenia diagnosis made during state habeas proceedings, he ignored the best corroboration imaginable for the proposition that trial counsel failed to discover crucial mental health evidence. To that end, Mr.

that end, Mr. Ayestas provided the district court with ample evidence regarding schizophrenia's typical progression and the timing of clues indicating when it began to affect his behavior. USCA5.678, 684-85; App.G10.

This support for his § 3599(f) motion notwithstanding, the district court denied it and withheld fact-development resources on the ground that Mr. Ayestas had not proven his entitlement to relief (App.C16), and then the Fifth Circuit "reinterpreted" that ruling as a decision that "any evidence of ineffectiveness, even if found, would not support relief" (App.A8). Remarking that the *Wiggins* claim was "meritless" and not "viable" (App.A8), it continued: "[A] prisoner cannot get funding to search for whatever can be found to support an as-yet unidentified basis for holding that his earlier counsel was constitutionally ineffective." App.A8.

Explaining that Mr. Ayestas could never meet the IAC deficiency prong, the Fifth Circuit stated that trial counsel: "spoke by phone" with Ayestas' Honduran relatives; "acquired Ayestas' school records;" knew of the substance abuse; and was "*examined by a psychologist.*" App.A10 (emphasis added). The Fifth Circuit then impermissibly "split" the prejudice inquiry into separate prejudice determinations, finding (1) that no jury would have found substance abuse sufficiently mitigating in light of the crime's brutality, and (2) that the chance of the mental health evidence influencing the verdict was "conceivable, but not substantially likely[.]" App.A11.[10] Upon realizing that trial counsel had not in fact hired a psychologist, the Fifth Circuit revised its opinion to focus on prejudice:

[10] Because it had held that there was no merit to the underlying claim, the Fifth

> Ayestas also points out that he was not in fact examined by a psychologist in 1997, but we stated he had been in our opinion. Our analysis is nonetheless unchanged. In our opinion, we held that even if Ayestas had shown there had been deficient performance under [*Strickland*], he did not show prejudice, that is, a substantial, not just conceivable, likelihood of a different result. Ayestas does not challenge this aspect of our panel opinion. Our conclusion that *Strickland* ineffectiveness was not shown remains unchanged.

App.B2 (internal quotation marks and citations omitted). After its revision, the surviving Fifth Circuit holding is that the *Wiggins* claim is meritless because Mr. Ayestas' motion papers and supplemental content did not prove that, but for the deficiency, there was a "substantial likelihood" of a life sentence.

The Fifth Circuit disposition in this case—denying a § 3599(f) motion for resources to develop facts in support of prejudice, on the ground that an inmate's motion failed to carry the ultimate burden of proof on that very question—is typical of how it uses the substantial-need standard to withhold expert and investigative services to post-*Martinez* IAC claimants. *See, e.g.*, *Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) (applying the substantial-need test and concluding that "the sought-after funding would have supported a meritless claim or would only supplement prior evidence"); *Crutsinger v. Stephens*, 576 F. App'x 422, 431 (5th Cir. 2014) ("*Martinez* * * * does not mandate pre-petition funding, nor does it alter our rule that a prisoner cannot show a substantial need for funds when his claim is procedurally barred from review."); *Wilkins v. Stephens*, 560 F. App'x 299, 315 (5th Cir. 2014) (denying fact development because "Wilkins offered little to no evidence that the investigative avenues counsel proposed to take hold any significant chance for

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Circuit ..lso held that there could be no state post-conviction deficiency. App.A12.

success"); *Sells v. Stephens*, 536 F. App'x 483, 499 (5th Cir. 2013) ("A petitioner cannot show a substantial need when his claim is procedurally barred from review.") (internal quotations omitted).

Texas district courts dutifully apply the Fifth Circuit rule, denying § 3599(f) services by premature reference to the merits of uninvestigated IAC claims. *See, e.g.*, Order Denying Motion for Funds at 5, Dkt. 58, *Ochoa v. Stephens*, 09-cv-2277 (N.D. Tex. Oct. 15, 2014) (denying resources because inmate "does not indicate how further investigation of [mitigation evidence] will substantially improve his chances of success"); Order at 4, Dkt. 56, *Tong v. Stephens*, No. 4:10-cv-2355 (S.D. Tex. Sept. 22, 2014) (noting that the Fifth Circuit rule requires a petitioner to "face[] something of a 'catch 22' in having to demonstrate that there is some relevant evidence he could discover without first having the funding to pursue that evidence," but denying services because he failed to demonstrate deficiency and prejudice); *Mamou v. Stephens*, 2014 WL 4274088, at *5 (S.D. Tex. Aug. 28, 2014) (denying services where petitioner "does not describe how [the] proposed investigation will meaningfully augment his anticipated claims" including "what he expects the interviews will uncover"); Order at 6, Dkt. 24, *Thompson v. Stephens*, No. 13-cv-1900 (S.D. Tex. May 2, 2014) (denying resources where inmate failed to describe, among other things, "what information did not come before the jury").

B. *Ayestas* Deepens A Split With The Fourth And Sixth Circuits, The Latter of Which Expressly Rejects The Substantial-Need Rule.

Only the Eleventh Circuit has signaled approval of the Fifth Circuit's substantial-need standard. *See Gary v. Warden, Georgia Diagnostic Prison*, 686 F.3d 1261, 1268 (11th Cir. 2012) ("We have interpreted the § 3599(f) phrase 'reasonably necessary' to mean the same as showing a 'substantial need' for the requested assistance."). The Fifth and Eleventh Circuits, however, do not apply the substantial-need rule identically. District courts in the Eleventh Circuit do not appear to require that inmates plead the product of the requested investigation in order to obtain § 3599(f) services—only that they show "good cause" for discovery. *See, e.g., Lee* v. *Humphrey*, 2013 WL 4482461, at *2 (S.D. Ga. Aug. 20, 2013) ("If a petitioner has not shown good cause for the [requested] discovery * * *, he is not entitled to an investigator to conduct the discovery or any experts to interpret the results of the discovery."); *Wilson v. Humphrey*, 2011 WL 2709696 at *4 (M.D. Ga. July 12, 2011) (same). In the Eleventh Circuit, there is good cause "where the specific allegations before the court show reason to believe that the petitioner may, *if the facts are fully developed*, be able to demonstrate that he is * * * entitled to relief." *Id.* (emphasis added) (citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

The Sixth Circuit, by contrast, has expressly rejected the substantial-need rule: "[A] showing of substantial necessity inappropriately 'implies that the movant must carry a heavier burden than that contemplated by the statute' as 'testimony could be reasonably necessary without being substantially necessary'." *Matthews v. White*, 807 F.3d 756, 760 n.2 (6th Cir. 2015) (internal citations omitted). Criticizing the Fifth and Eleventh Circuits, the Sixth Circuit went on to note that "[n]either

Circuit has explained why this heightened standard is appropriate." *Id.* Instead, courts in the Sixth Circuit have long applied the Fourth Circuit's approach in *Wright v. Angelone*, 151 F.3d 151 (4th Cir. 1998), in which "an expert should be appointed when a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance." *Id.* at 163. (Although the Fourth and Sixth Circuits use the same § 3599(f) standard, no Fourth Circuit case appears to have language expressly rejecting the Fifth Circuit's substantial-need formulation.)

The Sixth Circuit has underscored that "the need to show the existence of a substantial question is not the same as the [substantial-need requirement]." *Matthews*, 807 F.3d at 760 n.2. Whereas a Fifth Circuit petitioner fails to meet a substantial-need standard if entitlement to relief is not evident from an undeveloped record, courts in the Sixth Circuit have held that a petitioner falls short of "reasonable necessity" only when some prior factual development discloses that the claim cannot be successful—i.e., when there has been a prior opportunity to develop a claims, that opportunity has produced a record, and that record has been adjudged by a court. *See, e.g.*, *Foley v. White*, 2016 WL 4487994 at *1, 2-3 (6th Cir. Aug. 26, 2016) (applying substantial-question standard and upholding the district court's denial of funds because the petitioner's "competency and mental health have been discussed, analyzed and adjudged numerous times []" and the record was "expansive and detailed").

The Tenth Circuit appears not to have taken a position on the meaning of "reasonable necessity" under § 3599(f). *See, e.g.*, *Rojem v. Gibson*, 245 F.3d 1130,

1139 (10th Cir. 2001) (holding defendant did not show necessity and thus the district court did not abuse its discretion in denying funding). Otherwise, the remaining circuits use varied standards for "reasonable necessity," and all suggest a considerably lower standard than substantial need.

The Second, Third, and Ninth Circuits use a "private attorney" standard, which essentially requires inmates to show only that the fact development would be undertaken by a reasonable attorney hired by a client of financial means. *See, e.g., U.S. v. Pitts*, 346 F. App'x 839, 841-42 (3rd Cir. 2009) (to meet the "private attorney standard," which asks whether "a reasonable attorney would engage such services for a client having the independent financial means to pay for them," a defendant must "demonstrate with specificity the reasons why such services are required") (internal citations omitted); *Cooper v. Calderon*, 255 F.3d 1104, 1112 (9th Cir. 2001) (applying private attorney standard, as well as clear and convincing showing that lack of investigation prejudiced defendant); *U.S. v. Parker*, 4 F. App'x 111, 112 (2d Cir. 2001) (applying private attorney standard, and finding defendant must "articulate a reasonable basis for the requested services.") (internal citations omitted).

The First, Seventh, and Eighth circuits all use standards emphasizing that the pertinent showing does not have to include a speculative description of unknown information, but merely an indication that there may be favorable information that is undiscovered. *See, e.g., U.S. v. Thurmon*, 413 F.3d 752, 756 (8th Cir. 2005) ("While a trial court need not authorize an expenditure * * * for a mere 'fishing expedition,' it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the devel-

opment of a defense to the charge.") (internal citations omitted); *Burris v. Parke*, 130 F.3d 782, 784 (7th Cir. 1997) (holding that reasonable necessity requires a "preliminary showing"); *U.S. v. Brandon*, 17 F.3d 409, 456 (1st Cir. 1994) (finding defendant required "to make at least some showing why the requested assistance would produce evidence likely to be pivotal to his defense.") (internal citations and quotations omitted).

Fifth Circuit petitioners like Mr. Ayestas face unique obstacles to obtaining § 3599(f) services necessary to factually develop their claims—and, by extension, unique impediments to the enforcement of basic constitutional guarantees. The Sixth Circuit has expressly rejected the Fifth Circuit's approach, and all but one of the remaining appellate jurisdictions appear to reject it by implication.

C. Mr. Ayestas' § 3599(f) Motion for Resources Should Have Been Granted.

Meritorious habeas claims do not present themselves; federal lawyers use resources to identify and develop them. Legal services and fact-development resources available under § 3599—originally administered under a precursor provision—are crucial to "[research[ing] and identify[ing]" an inmate's "*possible* claims and their *factual bases*." *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (emphasis added). The fact development function secured by § 3599(f) reflects the principle that "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *Id.* at 858.

Under any standard other than "substantial need," Mr. Ayestas' § 3599 motion would have been granted. The Fifth Circuit's test, however, conditions the

availability of resources to develop facts on the ability of inmates to prove those very facts when they plead their claims. That logical circularity is impermissible when state habeas counsel forfeits a *Wiggins* claim; by definition, an inmate has never had the benefit of fact development on the Sixth Amendment challenge. The entitlement to experts and investigators cannot depend on the factual sufficiency of the pleading; *McFarland* itself held that, to be meaningful, § 3599(f) services "must be available prior to the filing of a first habeas petition." 512 U.S. at 860.

The Fifth Circuit practice does not just violate *McFarland*; it also frustrates the purposes of *Martinez* and *Trevino*, which together reflect this Court's recognition that state inmates can arrive at their federal habeas proceeding having been deprived of any prior opportunity to develop IAC claims and, as a corollary, to enforce the Sixth Amendment right to counsel. *See Trevino*, 133 S. Ct. at 1921 ("[F]ailure to consider a [state habeas lawyer's ineffectiveness as] a potential cause for excusing a procedural default will deprive the defendant of any opportunity at all for review of an [IAC] claim.") (internal quotations omitted); *Martinez*, 132 S. Ct. at 1318 ("By deliberately choosing to move [IAC litigation to a collateral-review phase in which counsel is not] constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims."). The basic premise of *Martinez* and *Trevino* is that the viability of IAC claims is not evident from an existing record, and requires investigation. *See Martinez*, 132 S. Ct. at 1318 ("Ineffective-assistance claims often depend on evidence outside the trial record."); *Trevino*, 133 S. Ct. at 1918 (pointing out that the Texas court has itself recognized the need for

extra-record evidence to substantiate an IAC claim). A § 3599(f) interpretation that withholds the experts and investigators necessary to develop an IAC claim guts the very constitutional guarantee that *Martinez* and *Trevino* sought to enforce.

Aggressive application of the substantial-need rule is particularly inappropriate when the issue is *Wiggins* prejudice. Although federal habeas counsel in possession of trial counsel's files may be capable of spotting and pleading a factually developed *Wiggins* deficiency prong, it cannot plead a factually developed *Wiggins* prejudice prong without enough resources to conduct at least some of the investigation into what trial counsel would have discovered had she not unreasonably narrowed her investigation. By definition, *Wiggins* prejudice requires an investigation because the prejudice *is the fruit of the investigation that should have been performed*. *See Wiggins*, 539 U.S. at 524 (counsel's "rudimentary knowledge of [their client's] history from a narrow set of sources" contrasted with undiscovered "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.") (internal citations and emphasis omitted).

With respect to the *Wiggins* claim here, the motion papers specified trial counsel's deficiency with particularity: failing to follow up on obvious red flags involving mental health and substance abuse. On prejudice, the motion papers identified categories of mitigating evidence that a resourced investigation would likely uncover, based upon those red flags. By definition, they could not present the results of an investigation with any greater specificity until the investigation was

conducted. Finally, the motion and complementary material showed that state habeas counsel committed the same mistakes as trial counsel, and that he ignored a schizophrenia diagnosis indicating that prior evidence of mental health problems almost certainly existed. Under the "substantial-question" standard from the Fourth and Sixth Circuits—or, for that matter, under a standard used by any jurisdiction other than the Fifth and Eleventh Circuits—the § 3599(f) motion would have been granted and the lower federal courts would not have proceeded to prematurely decide the *Wiggins* claim on the merits.[11]

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Ayestas prays that this Court grant a writ of certiorari to resolve the Questions Presented.

November 7, 2016

Respectfully Submitted,

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[11] A determination that the lower courts impermissibly withheld § 3599 resources logically entails a vacatur of the Fifth Circuit's premature merits disposition of the underlying *Wiggins* claim. *Cf. Wellons v. Hall*, 558 U.S. 220, 223, 226 (2010) (vacating premature merits disposition on grounds that lower courts first had to decide entitlement to fact development).

NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Lee B. Kovarsky, hereby certify that true and correct electronic versions of this Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on November 7, 2016, via e-mail to:

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